Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of:	)	
	)	
Market Entry and Regulation of Foreign - Affiliated Entities	)	IB Docket No. 95-22

COMMENTS OF
CABLE & WIRELESS, INC.

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SUMMARY

The Commission proposes to examine effective market access as part of its Section 214 analysis of foreign carrier requests to provide U.S. facilities-based international services. CWI supports flexible consideration of market access in market opening decisions, but is concerned that any Commission efforts in this area must not create barriers by establishing conditions and tests outside the realm of traditional bilateral and multilateral negotiations.

Accordingly, the proposals should be significantly modified in order to promote rather than frustrate the Commission's laudable public interest objectives. The Commission must focus solely on the home markets of foreign carrier applicants (or of foreign carriers behind non-carrier applicants). The risk to bilateral negotiations would be particularly grave if the Commission adopted a primary market approach, which would destroy incentives to open the home market since nationals might still be denied entry to the U.S. Broad inquiry into so-called primary markets also would prevent the Commission from implementing its policies in a timely manner by embroiling it in a multitude of complex, fact-specific inquiries, greatly delaying entry and depriving U.S. consumers of additional international communications choices. Such protracted and uncertain proceedings would create profound disincentives to beneficial investment and sacrifice opportunities for U.S. carriers to compete immediately in the home market in the hope that at some indefinite future point they will be granted entry to other markets as well.

In addition, withholding authority when a home market is open will be ineffective, since the governments in other markets where the applicant has a presence (often in the form of a franchise) will have little or no incentive to liberalize, given the lack of benefit to their own nationals. The primary market approach also would raise serious risks that U.S. carriers seeking entry abroad will be turned down. Many nations emulate the Commission's policies, and many U.S. carriers, including AT&T and several RBOCs, have invested in telecommunications providers in nations that are not open to competition. For these and other reasons, looking beyond the home market is unprecedented in U.S. law and inconsistent with the proposed Senate telecommunications reform legislation. The Commission's dominance policies are intended to, and have proven effective in, preventing discrimination, and the Commission should rely on them, rather than misguided inquiries into primary markets.

With respect to other proposals, the Commission may incorporate a rough equivalency analysis into Section 310(b), in order to determine whether U.S. entities have equivalent opportunities to invest in spectrum licensees. This inquiry should not focus on specific services (e.g., PCS-to-PCS); rather, in order to accommodate variations in infrastructure and technology between countries, it should concern categories of similar services (e.g., PCS-to-broadband CMRS).

Finally, the Commission should reduce burdens imposed on dominant carriers by streamlining tariff and cost support requirements and discontinuing prior certification of circuit additions and deletions. It should not impose additional, unwarranted requirements such as mandated disclosure of operations records,

establishment of cost-based accounting rates as a pre-condition to entry, and publication of all accounting rates maintained by a foreign affiliate with other countries. These requirements are unnecessary to accomplish the Commission's objectives and would impose unwarranted burdens and impede competition.

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Cable & Wireless, Inc. ("CWI") respectfully submits its comments regarding the above-captioned Notice of Proposed Rulemaking ("NPRM").[1] CWI's concern with the NPRM is not with its policy objectives, but rather with its efficacy. As discussed herein, CWI believes that, if the Commission moves forward with its market access proposals, the approach set forth in the NPRM must be significantly changed in order to accomplish the Commission's public interest goals.

I. BACKGROUND

In the NPRM, the Commission sets forth three basic goals underlying its market entry proposal: promoting effective competition in the global market for communications services; preventing anti-competitive conduct in the provision of international services or facilities; and encouraging foreign governments to open their communications markets.[2] The Commission finds, as a general principle, that allowing the entry of foreign carriers into the United States international services

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[1] FCC 95-53 (released February 17, 1995). CWI is an indirect, wholly-owned subsidiary of Cable and Wireless plc. Cable and Wireless plc is a publicly traded corporation organized under the laws of the United Kingdom.

[2] NPRM at ¶ 26.

market will provide additional competition, ultimately benefiting consumers. It tentatively concludes, however, that unrestricted facilities-based entry is not in the public interest when United States carriers do not have effective opportunities to compete in the provision of services in the foreign carrier's "primary" markets. Primary markets are defined as "key markets where the carrier [seeking authority] has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and traffic flows between the United States and that country are significant."[3]

The Commission consequently asks whether it should require foreign carriers seeking to provide international facilities-based services to demonstrate, as an element of the Section 214 public interest analysis, that effective market access is available to United States carriers in the primary market(s) served by the carrier desiring entry. This factor would be important but not dispositive; the Commission also would consider other factors in its public interest calculus, including national security, the openness of other segments of the foreign carrier's markets, and the ability of the foreign carrier to discriminate against unaffiliated United States carriers.[4]

In addition, the NPRM seeks to establish a minimum level of foreign carrier ownership which would trigger the proposed entry standard. The Commission seeks comment on whether this affiliation threshold should be 10%, 25%, or some other

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[3] NPRM at ¶ 43.

[4] Id. at ¶ 40.

level of capital stock.[5] Finally, the Commission asks whether the proposed effective market access test should be incorporated into the Section 310(b) public interest analysis,[6] and proposes several modifications to its dominant carrier policies.[7]

II. THE COMMISSION SHOULD APPROACH EFFECTIVE MARKET ACCESS WITH DUE CONSIDERATION OF BROADER U.S. TRADE OBJECTIVES, IN A FLEXIBLE MANNER THAT TAKES INTO ACCOUNT THE TOTALITY OF THE CIRCUMSTANCES.

CWI supports incorporating access considerations as an element of market entry determinations, and concurs that the Commission has the expertise to assess whether U.S. companies have effective market access opportunities in other nations. At the same time, however, CWI urges the Commission not to act in isolation, but rather to assure that its regulatory policies complement traditional bilateral and multilateral negotiations. Otherwise, the effective market access determination could seriously interfere with such administration initiatives as the GII-related Agenda for Cooperation. Similarly, care should be taken to ensure that the effective market access initiative does not trigger retaliation in unrelated markets (such as equipment), frustrate negotiation of multi-lateral market opening agreements, or complicate efforts to negotiate bilateral agreements. The effect on bilateral negotiations would be particularly deleterious if the Commission pursued its "primary" market proposal; in such cases, a foreign government would have no incentive to liberalize if its nationals still were denied

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[5] Id. at ¶ 61.

[6] Id. at ¶¶ 92-103.

[7] Id. at ¶¶ 84-91.

access to the U.S. market because of investments in third countries.[8] Accordingly, the Commission must develop and apply its effective market access rules in a manner that is fully consistent with U.S. trade policies taken as a whole.

Against this background, the Commission should, as stated in the NPRM, apply effective market access as a flexible and properly focused element of its public interest determination. Flexibility is essential because market conditions change, and each determination must be based on a balance of all relevant circumstances.[9] At the same time, an inquiry that sweeps too broadly would be unduly cumbersome, and one that is too narrow would be meaningless.

With this in mind, CWI supports the Commission's intent to treat the six effective market access factors as important, but not dispositive, elements of the public interest determination.[10] Because of varying regulatory and market conditions around the world, it is important to examine the totality of the circumstances when deciding whether U.S. carriers can effectively compete in a foreign market, rather than treating the access factors as a checklist representing all relevant considerations. This flexible

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[8] As CWI discusses below, there are several other compelling reasons to focus only on the home country of the carrier seeking entry, rather than encompassing other nations where that carrier happens to have a presence.

[9] With respect to flexibility, CWI commends the Commission for rejecting AT&T's "comparable market access" ("mirror") proposal as a method of regulating foreign entry. Id. at ¶ 41. AT&T's proposal would require that foreign regulations be essentially identical to those in the U.S. for a foreign entity to gain access to U.S. markets. CWI agrees with the Commission that such a rigid requirement would be impossible to meet and would discourage open markets. Id. at ¶ 49.

[10] Id. at ¶ 40.

approach has served the Commission well in the ISR context, and should be applied as well with regard to facilities-based applications.

III. THE COMMISSION SHOULD ENCOURAGE GLOBAL COMPETITION INCREMENTALLY, FOCUSING ON THE HOME MARKETS OF ENTITIES SEEKING AUTHORITY TO PROVIDE FACILITIES-BASED INTERNATIONAL SERVICES.

In deciding whether to grant entrance authority to a foreign carrier, the Commission proposes to examine the ability of U.S. carriers to enter the foreign applicant's "primary" market(s).[11] This reference to primary markets is appropriate only to the extent that it refers to the multiple home markets of separate carriers in a joint venture applicant, such as France Telecom and Deutsche Telekom are doing with respect to Sprint through their Atlas venture. In such cases, consideration of the home markets of all investors in the joint venture is necessary in order to achieve the Commission's objectives.

In the context of an application from a single foreign carrier, however, the Commission should look only at that carrier's home market. As discussed below, a broader, "primary market" approach would undermine the Commission's objectives and harm consumers.

As an initial matter, the inevitable result of such a broad "primary market" inquiry would be needlessly protracted and contentious proceedings that create disincentives to beneficial investment and postpone or preclude additional competition in the U.S. international marketplace. The effective market access policy accordingly

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[11] NPRM at ¶¶ 43-44.

will be an ineffective "carrot" to liberalization, if it is used to defer entry until all markets associated with a foreign carrier are opened. American consumers and service providers will benefit from approving entry as long as the foreign carrier's home market is open, because there will be additional facilities-based competition in the U.S. and the opportunity for U.S. carriers to compete effectively in that market. The Commission should not hold up competition in these circumstances.

Moreover, utilization of a "primary markets" standard likely would frustrate the Commission's ability to implement its policies in a timely manner by embroiling it in a multitude of complex, fact-specific inquiries each time it was presented with a foreign carrier's application for authority to provide U.S. international facilities-based services. Increasingly, telecommunications entities -- including U.S.-based carriers -- have global ties though equity arrangements and investments.[12] As a result, the Commission will often be faced with situations where a carrier identified closely with a particular home market also has interests in telecommunications providers in other countries. Under these circumstances, examination of each market where that carrier has an interest could greatly delay entry (or even result in its denial) and deprive U.S. consumers of additional international communications choices.

Significantly, withholding U.S. entry permission when a carrier's home market is open but another market in which the carrier operates (which is foreign to that carrier) is not, is likely to be ineffective as well as inimicable to the interests of U.S.

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[12] A prime example is AT&T's joint investment, along with the Swiss, Dutch, Swedish and Spanish PTTs, in Uniworld.

consumers. Tying entry privileges to effective market access may make sense when the applicant's home country is affected. In that case, the home government may be motivated to liberalize, because doing so benefits its own nationals. In contrast, if the entity seeking market access simply has an interest -- even though large -- in a carrier outside its home country, the government in the third country likely will have little motivation to encourage competition, since doing so would not directly benefit its nationals.

CWI also believes that a broadly interpreted definition of primary market would directly harm U.S.-based carriers. Other nations often follow the Commission's lead on telecommunications policy. Particularly if a nation views the market access test as retaliatory or overreaching, it may apply the same standard to U.S. companies seeking entry abroad. Increasingly, U.S. companies -- including AT&T and several RBOCs -- are investing in telecommunications providers in nations that are not open to competition. (See Chart 1) Accordingly, a foreign regulator might well deny entry to U.S. carriers by looking beyond the openness of the U.S. "home" market to other "primary markets" in which they operate. This threat could frustrate development of the Global Information Infrastructure, as U.S. entities are among the leading telecommunications providers capable of upgrading infrastructures abroad (often in exchange for exclusive franchises, at least for a limited period).

It is for these and similar reasons that looking beyond the home market of a foreign entity seeking U.S. entry appears to be unprecedented in U.S. law. Recently, for example, Congress explicitly focused only on the home market in permitting the

CHART 1
EXAMPLES OF U.S. INVESTMENTS
IN OVERSEAS TELECOMMUNICATIONS MARKETS

COUNTRY	SERVICE	NAME	OWNERSHIP	STATUS
Argentina	Cellular (Buenos Aires)	CRM	BellSouth 38% Motorola 25%	Duopoly
Australia	Local, long distance and international	OPTUS	BellSouth 24.5%	Duopoly until 1997
Hungary	Local, long distance and international	MATAV	Ameritech 15% (via consortium)	Monopoly
Mexico	Local, long distance and international	TELMEX	SBC 10% (via consortium)	Monopoly through 1996
Venezuela	Local, long distance and international	CANTV	GTE 20% AT&T 2% (via consortium)	Monopoly

Secretary of Energy to provide energy research and development grants to U.S. subsidiaries of foreign entities. Under the Energy Policy Act of 1992, the Secretary of Energy may provide grants to such subsidiaries if she certifies that the parent is "incorporated in a country which affords to United States-owned companies opportunities comparable to those afforded any other company, to participate in any joint venture similar to those authorized under this Act."[13] Similarly, and of direct relevance to the Commission in this proceeding, the determination of whether a service provided is from a particular "Member" country under GATT depends on whether the service supplier is either (1) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member, or (2) in the case of the supplier of a service through a commercial presence, is owned or controlled by persons of that Member or persons identified under point 1.[14] Notably, the pending Senate telecommunications reform bill, S.652, also focuses only on the home market in providing for elimination of Section 310(b) restrictions for nationals of countries offering equivalent market opportunities for U.S. entities. Other examples occur with respect to mergers, acquisitions and takeovers.[15]

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[13] 42 U.S.C. § 13525 (emphasis added).

[14] Annex IB of the General Agreement on Trade and Services, Uruguay Round 1994, Part 6, Article 28, Definitions.

[15] See The Exon-Florio Amendment, 50 U.S.C.App. § 2170, which requires information to be provided on the principal place of business of the foreign entity, the name, address and nationality of the parent, and the name, address and nationality of the persons or interests that will control the U.S. person being acquired. See 31 C.F.R. § 800.402(c)(iv)-(vi) (1994).

Finally, the primary market approach is a needlessly overreaching tool. The Commission's dominant carrier policies were developed explicitly to prevent discrimination between affiliated carriers. This policy should continue to be relied upon, in both the ISR and facilities-based contexts, along with the International Settlements Policy, to prevent anti-competitive behavior while fostering global service development.

IV. MARKET ACCESS MAY BE INCORPORATED INTO THE SECTION 310(b) PUBLIC INTEREST ANALYSIS, BUT THE COMMISSION SHOULD REJECT WHOLESALE APPLICATION OF THE SECTION 214 EFFECTIVE MARKET ACCESS TEST.

As CWI explained in a Petition for Declaratory Ruling filed in January of this year, equivalency may be a significant element of the Commission's public interest inquiry under Section 310(b) of the Communications Act.[16] In that Petition, CWI sought authority to invest in a common carrier VSAT licensee and demonstrated that the U.K. offers essentially unlimited opportunities for U.S. entities to obtain many types of spectrum licenses. In this context, market access considerations can create strong incentives for foreign governments to liberalize spectrum opportunities for U.S. entities. Accordingly, consideration of whether U.S. entities can invest in entities holding foreign spectrum licenses is both relevant and warranted under the Section 310(b) public interest determination.[17]

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[16] Petition of Cable & Wireless, Inc. for a Declaratory Ruling Regarding Control of Licenses for Very Small Aperture Terminals Used to Provide Common Carrier Services, File No. 60-SAT-MISC-95, filed Jan. 26, 1995.

[17] CWI is focusing solely on investments in common carrier radio licensees, and takes no position regarding broadcast or aeronautical licensees.

The Commission should not, however, simply import the Section 214 effective market access standard into Section 310. That standard, as articulated in the NPRM, considers factors that are principally relevant to the provision of international, facilities-based services. The licenses covered by Section 310, in contrast, can be used for a wide range of fixed and mobile services, the vast majority of which are domestic.

Against this background, the Commission's focus under Section 310 should be on rough equivalency, such as the availability of similar categories of spectrum licenses to U.S. entities. For example, in evaluating an application by a foreign carrier to obtain control of a PCS licensee, the Commission should determine whether a U.S. entity could obtain a broadband CMRS license in the foreign country. The analysis need not focus too narrowly, such as PCS for PCS.[18] Different nations will have different regulatory schemes, different technical parameters applicable to individual services, and wireless infrastructures at different stages of development. Accordingly, a strict service-for-service analysis may produce inequitable and undesirable results.[19]

V. THE COMMISSION SHOULD REFORM ITS DOMINANT CARRIER POLICIES IN A MANNER THAT REDUCES RATHER THAN INCREASES BURDENS.

The NPRM seeks comment on several proposals to modify requirements imposed on dominant international common carriers. As discussed herein, those

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[18] Cf. Notice at ¶ 96.

[19] Whatever course the Commission pursues, CWI should be granted the requested VSAT authority. As demonstrated in CWI's petition, U.S. entities are free to obtain VSAT licenses specifically, and spectrum licenses generally, in the U.K.

proposals should be adopted to the extent they reduce constraints on flexibility and responsiveness. There is no basis, however, for imposing additional burdens.

Tariff requirements. CWI supports eliminating the requirement that dominant foreign-affiliated carriers file tariffs on 45 days' notice with cost support. Shortening the notice period to 14 days will encourage competition by allowing carriers to respond more quickly to marketplace developments. The reduced notice period also will minimize the competitive drag created by sending lengthy signals about new rates and services. Elimination of the cost-support requirement will benefit consumers by reducing overhead, and given the competitive nature of the marketplace, will not raise risks of unreasonably high rates.

Circuit certifications. CWI also urges the Commission to remove the prior certification requirement for adding or discontinuing circuits.[20] Although the Commission proposes to maintain the prior certification requirement, the NPRM asks for comments on whether it remains necessary. CWI believes the certification requirement is superfluous and, in practice, is merely utilized by a few competitors to discern and damage business plans of their rivals. In a competitive market, regulatory intrusion into investment decisions is both unwarranted and counter-productive. In any event, if carriers remain obligated to file quarterly traffic and revenue reports for routes on which they are dominant, the Commission will have adequate information to identify potentially discriminatory behavior.

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[20] Id at ¶ 85.

Disclosure of operational records. CWI opposes the proposed requirement that a dominant foreign-affiliated carrier maintain and disclose network facilities and services procured from the foreign carrier affiliate.[21] Such a general condition is unnecessary because the prohibition on special concessions and the other nondiscrimination measures accomplish the same result.

Cost-based accounting rates. CWI applauds the Commission's express rejection of AT&T's proposal to require cost-based accounting rates as a condition of foreign carrier entry. The Commission declined to require such a linkage in the past and, as the NPRM points out, effective access to the applicant's home market should itself lead to lower accounting rates. It would be premature to require cost-based rates as a pre-condition to entry, before competition in the foreign country is given an opportunity to produce such rates.[22]

VI. THE COMMISSION SHOULD NOT MANDATE DISCLOSURE OF ACCOUNTING RATES BY ENTITIES SEEKING INTERNATIONAL FACILITIES AUTHORIZATIONS

The Commission seeks comment on requiring foreign-affiliated applicants to disclose all of their international accounting rates. Specifically, the Commission

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[21] Id at ¶ 86. The proposed requirement was imposed on BT and MCI, due to market shares in their respective home countries. Similarly, the conditions might rationally be imposed on AT&T and Uniworld.

[22] The Commission also asks whether it should adopt re-file limitations proposed by AT&T. CWI does not believe this proceeding should be broadened to address the multiple, complex issues raised by re-file. Rather, as CWI recommended in comments on MCI's petition regarding Sprint's traffic reorigination services, the Commission should initiate a separate proceeding that focuses on the effects of re-file based offerings.

proposes "to require that any affiliated, facilities-based carrier regulated as dominant on any U.S. international route for the provision of switched services file with the Commission a complete list of the accounting rates that its foreign carrier affiliate maintains with all other countries," and to apply this "transparency requirement to affiliated carriers that are regulated as dominant in their provision of switched basic services via resold private lines."[23]

CWI urges the Commission to reject this proposal. Disclosure of accounting rates implicates issues of international comity and commercial confidentiality. The disclosure requirement would place prospective entrants between the Commission, which would compel disclosure as a condition of approval, and third-party foreign PTTs, which are wholly disinterested in the application for 214 authority. In most cases, those PTTs regard accounting rate agreements as confidential, and forced disclosure could subject the prospective entrant to retaliation. Indeed, the proposed requirement could be counterproductive, because some foreign governments might view the disclosure obligation as heavy-handed, and decline to lower accounting rates with U.S. carriers as retribution. Finally, the Commission recently has recognized that there are sound competitive reasons for keeping transiting rates confidential.[24]

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[23] Id. at ¶ 87.

[24] See Public Notice, File No. CCB-IAD 95-101 (released Feb. 21, 1995), at ¶¶ 18, 19.

VII. CONCLUSION

The effective market access proposals seek to accomplish several laudable objectives. As currently structured, however, they will be both ineffective and counterproductive. Accordingly, the proposals should be modified in significant respects to assure the Commission's goals are promoted rather than undermined.

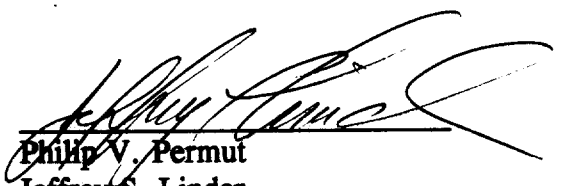
Specifically, the Commission should coordinate with other U.S. government agencies in developing and applying the effective market access test. In addition, it is critical that the Commission apply the test flexibly and focus solely on the home market of the carrier seeking entry (or the carriers behind a joint applicant). Broader inquiry into "primary markets" would eviscerate the utility of the market access examination, destroy investment incentives, harm consumers, place U.S. carriers at risk overseas, and be completely ineffective.

CWI agrees that the Commission may incorporate a flexible market access analysis into Section 310(b), with due recognition that the factors comprising the Section 214 market access inquiry are generally inapplicable with respect to spectrum licenses. Finally, the Commission should reduce tariff and cost support burdens for dominant carriers, discontinue the prior certification requirement for circuit additions and deletions, decline to require disclosure of operational records and to make cost-based accounting rates a pre-condition to foreign entry, and not mandate publication of international accounting rates by foreign carriers seeking international Section 214

authority. Modification of the proposals in these respects will promote international competition, benefit consumers, and directly advance the public interest.

Respectfully submitted,

CABLE & WIRELESS, INC.

By: 

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